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In The

Supreme Court of the United States

October Term, 1968

No. 237

NICHOLAS ANGELERI,

Petitioner,

- v -

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

MICHAEL A. QUERQUES
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501 Central Avenue
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STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Nicholas Angeleri, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered on April 1, 1968 which judgment affirmed a judgment of conviction and sentence of the Somerset County Court entered on September 29, 1967.

Citation to Opinion Below

The opinion of the Supreme Court of New Jersey, printed in Appendix B hereof, is reported in 51 N.J. 382, 241 A.2d 3 (1968).

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on April 1, 1968. By order of May 28, 1968 the issuance of the mandate on affirmance was stayed pending the filing, within 30 days thereof, of this petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) since petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

Questions Presented

1. Whether the New Jersey Rule of Court requiring a defendant who wishes to rely on the defense of alibi to supply to the prosecution, on demand, a signed bill of particulars giving the places where the defendant claims to have been at the time of the offense and the names and addresses of the witnesses who will be called to establish such alibi, violated petitioner's rights under the Fifth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution, which are printed in Appendix A hereto.

Statement of the Case

The petitioner was indicted by a Somerset County Grand Jury and charged with four counts of carnal abuse, in violation of N.J.S. 2A:138-1 and one count of impairing the morals of a girl 12 years of age, in violation of N.J.S. 2A:96-3 (D1a-2a).*

Prior to trial the State served upon the defense a Demand for Bill of Particulars as to alibi pursuant to Rules Governing the New Jersey Courts, R.R. 3:5-9 (Appendix D, infra). The petitioner moved to vacate this demand on the ground that it violated his rights under the United States Constitution (Appendix D, infra). The trial court denied this motion and interlocutory leave to appeal sought from the Appellate Division of the Superior Court and from the Supreme Court of New Jersey was denied. Subsequently the petitioner supplied a bill of particulars as to alibi giving, as required, the names and addresses of those persons (four in number) upon whom he would rely to establish his presence away from the scene of the crime (Appendix D, infra).

At trial the complaining witness testified that the petitioner had intercourse with her on four different days and that on another day he had engaged her in immoral conduct. The petitioner did not testify in his own defense but did produce as witnesses three of the persons whose names

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* References are to petitioner's appendix in the Supreme Court of New Jersey which has been certified and filed as part of the official record in this Court.

had been previously supplied to the prosecution in response to the Bill of Particulars as to Alibi. Two of these witnesses, a physician and an accountant, testified that petitioner was elsewhere on two of the occasions testified to by the complaining witness (D65a-108a; D110a-112a). Both of these witnesses had been interviewed prior to trial by a county prosecutor's detective (D70a, 111a-112a), and one of them, petitioner's accountant, was served by the State with a subpoena to bring various records of his financial dealings with petitioner to court with him (D65a-67a). The witness was cross-examined extensively based upon these records (D71a-94a).

Petitioner was convicted and on September 29, 1967 was sentenced to a term of not less than two nor more than three years in the New Jersey State Prison, on each count, the terms to run concurrently. Petitioner appealed to the Appellate Division of the Superior Court, claiming that the rule as to the bill of particulars as to alibi, violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court of New Jersey certified the appeal on its motion prior to its having been argued in the Appellate Division. On April 1, 1968 the Supreme Court handed down its decision holding that the Rule was not unconstitutional. The Supreme Court of New Jersey granted petitioner's motion to stay its mandate and continue petitioner on bail pending the filing of, and determination upon, this petition for a Writ of Certiorari.

Reasons for Granting the Writ

1. Rule 3:5-9 of the Rules Governing the New Jersey Courts (1968) provides that a defendant who intends to rely on the defense of alibi must supply, on demand of the prosecutor, a written bill of particulars setting forth the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Upon receiving these particulars the prosecuting attorney must furnish the defendant with the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the offense. If the defendant fails to provide the demanded particulars he may be excluded from presenting alibi evidence (Appendix A, infra).

Thirteen states, in addition to New Jersey, have statutes or rules requiring a defendant to provide the prosecution with advance notice of an alibi defense.[1] Six of these states additionally require, as does New Jersey, that the names and addresses of proposed alibi witnesses be supplied to the prosecution on demand.[2] In every instance

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1. Ind. Ann. Stat. Section 9-1631 to 1633 (1956); Iowa Code Section 777.18 (1958); Kan. Gen. Stat. Ann. Section 62, 1341 (1949); Mich. Stat. Ann. Section 28. 1043 to 1044 (1948); Minn. Stat. Section 630.14 (1947); N.Y. Code Crim. Proc. Section 295-1; Ohio Rev. Code Ann. Section 2945, 58; Okla. Stat. tit. 22, Section 585 (1951); S.D. Code Section 34. 2801 (1939); Utah Code Ann. Section 77-12-17; Vt. Stat. Ann. tit. 13, Section 6561-62. (1958); Wis. Stat. Section 955.97 (1951); Ariz. Rules Crim. Proc. 192B.

2. Arizona, Iowa, Kansas, Michigan, New York and Wisconsin.

in which these statutes have been challenged the state courts have, with little or no discussion, found them to be constitutional. See the cases collected in State v. Angeleri, 51 N.J. 382, 241 A.2d 3 (1968) (Appendix B, infra). This Court has never undertaken to review the constitutionality of these statutes on the merits and, indeed, has never reviewed the validity of any prosecution discovery against a criminal defendant since the landmark decision in Boyd v. United States, 116 U.S. 616 (1886). In that case a prosecution subpoena directing the defendant to produce certain incriminating papers in court was found to violate the Fourth and Fifth Amendments. In view of the increasing concern today with criminal discovery and in light of Malloy v. Hogan, 378 U.S. 1 (1964), which made the Fifth Amendment's self-incrimination clause binding upon the states through the Fourteenth Amendment, review should be granted in this case.

A vast amount of critical commentary has been directed at the constitutionality of prosecution discovery against a criminal defendant. Many of these articles have dealt not with the alibi statutes directly but with a state court decision which relied upon the alibi statutes as support for granting the prosecution discovery of doctor's names, medical reports and x-rays relating to a rape defendant's claimed defense of impotence. Jones v. Superior Court of Nevada County, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (Sup. Ct. 1963). Two judges dissented in that case, commenting,

> "The majority opinion does not merely enlarge a simple judicial principle of pretrial

procedure, it fundamentally alters our concepts of the rights of the accused and forces him to come forward with information before the prosecution has presented a case against him."

Many of the commentators have voiced criticism over the Jones' decision and have questioned its constitutionality. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L. Rev. 89 (1965); Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U. Intra. L. Rev. 268 (1967); Wilder, Prosecution Discovery and the Privilege against Self-Incrimination, 6 Am. Cr. L.Q. 3 (1968); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif. L. Rev. 135 (1963). Notes; 63 Columbia L. Rev. 361 (1963); 15 Stanford L. Rev. 700, 49 Iowa L. Rev. 176 (1963); 20 Wash. & Lee L. Rev. 159 (1963); but See Notes, 35 U. of Colo. L. Rev. 290 (1963); 8 Vill. L. Rev. 110, 61 Mich. L. Rev. 987 (1962); 76 Harv. L. Rev. 838 (1963). As noted by Professor Louisell, supra at 98-99, if the "defendant's historic immunity from the need to 'show his hand'" is "an inherent part of the privilege against self-incrimination" then the Jones' decision constituted an encroachment upon the privilege.

The federal experience in prosecution discovery has also indicated the serious constitutional questions involved. An alibi rule was proposed in one of 1944 drafts of the Federal Rules of Criminal Procedure but was not adopted at that time. See Stewart, Comments on the Federal Rules of Criminal Procedure, 8 John Marshall L. Q. 296 (1943);

Dession, The New Federal Rules of Criminal Procedure II, 56 Yale L.J. 197, 215 (1947); Note 60 Yale L.J. 626, 632 (1951). The 1966 revision of the Federal Rules of Criminal Procedure enacted, in Rule 16(c), a provision for limited discovery by the government of tangible items which a defendant intends to produce at trial. This provision is much more restrictive than the alibi statutes since it only comes into operation after a defendant has been afforded similar discovery. Thus, the defendant can, in some measure, control the discovery against himself while in the New Jersey alibi rule it is the prosecutor who may, initially, demand the information from the defendant. In dissenting from the adoption of Rule 16, Mr. Justice Douglas took note of the "current controversy among judges, prosecutors, defense lawyers and other legal commentators" concerning the "extent to which a court may compel the defendant to disclose information or evidence pertaining to his case" in light of the pribilege against self-incrimination. 15 L. Ed. 2d xcviii. Mr. Justice Douglas noted that "a serious constitutional question lurks" in this area. Mr. Justice Black also dissented, agreeing with Mr. Justice Douglas that "some of the proposed criminal rules go to the very borderline if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself" 15 L. Ed.2d lxxvi, As noted, the alibi rule goes even further than Rule 16(c) in forcing a criminal defendant to provide evidence which may aid in his conviction.

There can be no doubt, of course, of the compulsion inherent in the rule. The trial court has the power to exclude the defense from presenting alibi witnesses if the prosecution demand is not

complied with. No defendant could be so foolhardy as to risk not providing the demanded information in the vain hope that a trial judge would permit the testimony notwithstanding. The gravity of the potential consequences compel a defendant to comply with the demand. As this Court said in Schmerber v. California, 384 U.S. 757, 763-64 (1966),

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524."

Some of the cases upholding alibi statutes have argued that the evidence provided absolves the defendant rather than incriminates him. One commentator has called this assumption "specious" since the witness may harm other aspects of the defense case or may place the defendant near the scene of some other crime. "Before trial it would be impossible to assess fully the risks and advantages involved in exposing such a witness to the prosecutor." Note, 16 Stanford L. Rev., supra at 702-703; Wilder, supra at 17. Furthermore, the demand incriminates because the privilege against self-incrimination has been interpreted to afford a defendant complete silence until a prima facie case against him is made out. Id. See also Schultz, supra at 270. Another commentator has suggested that the right of the defendant to remain silent until the case against him is presented is rooted more in "due process notions of fundamental fairness" than in the Fifth

Amendment. Note, 76 Harv. L. Rev., supra at 840. Others have also suggested that prosecution discovery is basically unfair since it adds to the already overwhelming balance of advantage held by the prosecution in criminal cases. It has been noted that questioning of defense witnesses by the prosecution may result in intimidation of these witnesses. Stewart, supra; Note, 76 Harv. L. Rev., supra at 840. Thus, the imbalance already inherent in the criminal process is further aggravated by permitting this type of discovery to the prosecution. Such a tipping of the scales, it is urged, constitutes a denial of due process of law.

There can be no question that this Court has placed the highest value upon the privilege against self-incrimination. In Miranda v. Arizona, 384 U.S. 436, 460 (1966), Mr. Chief Justice Warren called the privilege "the essential mainstay of our adversary system." In recent years this Court has been zealous to protect the privilege and to strike down any procedure which "cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609 (1965). The alibi rule herein does just that. A defendant who wishes to remain silent, as the privilege allows him to do, must do so at the cost of forfeiting his right to present witnesses in his own behalf. As this Court noted recently, when one constitutional right must be waived in order to assert another "an undeniable tension is created." Simmons v. United States, ___ U.S. ___, 19 L. Ed. 2d 1247, 1259 (1968). In Nieves v. United States, 280 F. Supp. 994, 1002 (S.D.N.Y. 1968), a three judge court had this to say:

> "We doubt that erosion of a defendant's fundamental rights in criminal proceedings can be sanctioned under the rubric of a balancing test. Indeed, we believe that the Supreme Court in Garrity and Griffin laid that theory to rest. Whether the Constitution denominates the protection as a right or a privilege, legislatures by means of threat of penalty or promise of reward cannot punish a defendant for exercising his constitutional protections or pressure him into waiving them."

Discovery rights for the prosecution, in the form of an alibi rule or otherwise, seem to run counter to the policies which lie at the heart of the privilege against self-incrimination. As such, one commentator has remarked that "the alibi pleading requirements would appear to be a ripe source for adjudication on constitutional grounds." Schultz, supra at 270. As noted previously, many judges and commentators have questioned the constitutionality of these procedures which are prevelant in fourteen of our states and, in a different and more limited way, in Rule 16(c) of the Federal Rules of Criminal Procedure. Since the federal standard is now applicable to the states due to Malloy v. Hogan, supra, the "wide variations from jurisdiction to jurisdiction in applying the privilege "should now yield" to a more "consistent application." Wilder, supra at 14, 23. Thus, it is submitted that the decision of the court below in upholding the constitutionality of the New Jersey alibi rule did so in a manner not consistent with prior decision of this court concerning the extent and nature of the privilege against self-incrimination. In addition, the de-

cision below deals with an area not heretofore entered by this Court but which should be in order to resolve the pressing and persistent problems raised by the efforts of prosecutors to obtain discovery from defendants in state criminal cases.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. QUERQUES
DANIEL E. ISLES
Attorneys for Petitioner

HARVEY WEISSBARD
On the Petition

Appendix A

Constitutional and Statutory Provisions Involved

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Constitutional and Statutory Provisions Involved

New Jersey Rule 3:5-9

Alibi

(a) Particulars by Defendant. If a defendant is to rely in any way on an alibi, he shall, on written demand of the prosecuting attorney, furnish a written bill of particulars, signed by him, and stating the specific place or places at which the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Such particulars shall be furnished the prosecuting attorney within 10 days from the service of such demand.

(b) Particulars by Prosecuting Attorney. Within 10 days after receipt of such bill of particulars from the defendant, the prosecuting attorney shall, on written demand therefor, furnish the defendant or his attorney with a written bill of particulars stating the names and addresses of the witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) Amendment. The trial court shall have power to order the amendment, amplication or reduction of the particulars mentioned in sections (a) and (b) of this Rule, or of the time of their service, as the ends of justice may require.

(d) Failure to Furnish. If such bill of particulars is not furnished as required, the party in default may be excluded from presenting any evidence at the trial as to defendant's absence

from or presence at, respectively, the scene of the alleged offense, or the court may impose such conditions and grant such adjournment as the ends of justice may require.

Appendix B

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-113 September Term 1967

(Same Title)

Argued March 5, 1968 — Decided April 1, 1968

On appeal from the Somerset County Court, Law Division.

Mr. Michael A. Querques argued the cause for appellant (Mr. Harvey Weissbard and Mr. Daniel E. Isles, of counsel and on the brief; Messrs. Querques and Isles, attorneys).

Mr. S. Philip Klein, Assistant Prosecutor, argued the cause for respondent (Mr. Michael R. Imbriani, Somerset County Prosecutor, attorney).

The opinion of the Court was delivered

PER CURIAM.

Defendant was convicted of violations of N.J.S. 2A:138-1 (carnal abuse) and of a violation of N.J.S. 2A:96-3 (impairment of a minor's morals) involving a 12-year-old girl. We certified his appeal before argument in the Appellate Division.

Defendant challenges the constitutionality of

R.R. 3:5-9[1] which requires a defendant, if he intends to rely upon an alibi, to furnish before trial a bill of particulars of that claim and the names and addresses of the witnesses "upon whom he intends to rely to establish such alibi." Defendant, asserting the rule invaded his privilege against self-incrimination under the Fifth and Fourteenth Amendments, moved to vacate the State's demand for particulars, which motion was

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1. The rule reads:

"(a) Particulars by Defendant. If a defendant is to rely in any way on an alibi, he shall, on written demand of the prosecuting attorney, furnish a written bill of particulars, signed by him, and stating the specific place or places at which the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Such particulars shall be furnished the prosecuting attorney within 10 days from the service of such demand.

(b) Particulars by Prosecuting Attorney. Within 10 days after receipt of such bill of particulars from the defendant, the prosecuting attorney shall, on written demand therefor, furnish the defendant or his attorney with a written bill of particulars stating the names and addresses of the witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) Amendment. The trial court shall have power to order the amendment, amplification or reduction of the particulars mentioned in sections (a) and (b) of this Rule, or of the time of their service, as the ends of justice may require.

(d) Failure to Furnish. If such bill of particulars is not furnished as required, the party in default may be excluded from presenting any evidence at the trial as to defendant's absence from, or presence at, respectively, the scene of the alleged offense, or the court may impose such conditions and grant such adjournment as the ends of justice may require."

denied. Both the Appellate Division and we denied leave to review that order before trial. State v. Angeleri, 48 N.J. 348 (1966). Defendant then complied with the rule, listing six witnesses, but calling only two at the trial. The State made no comment upon his failure to call the remaining witnesses.

Our rule of Court is not designed to compel a defendant to say anything. Rather it requires the specified pretrial disclosure if, but only if, the defendant plans to assert an alibi. As we said in State v. Baldwin, 47 N.J. 379, 388 (1966), cert. denied, 385 U.S. 980, 17 L. ed. 2d 442 (1966):

> "* * * In calling upon a defendant to reveal a claim of that kind before trial, our rule is designed 'to avoid surprise at trial by the sudden introduction of a factual claim which cannot be investigated unless the trial is recessed to that end.' State v. Garvin, 44 N.J. 268, 272-273 (1965). Our rule replaced a statute, R.S. 2:190-7, adopted in 1934. As the statement annexed to the legislative bill recited, the purpose of that act was 'to do away with the existing unfairness in criminal trials of a surprise alibi * * *.'"

See 6 Wigmore, Evidence (3d ed. 1940) §1855b, pp. 418-420. There is no suggestion that the State sought the pretrial disclosure for any other reason or put it to any other use.

Defendant does not say his alibi, or its pretrial disclosure, did in fact incriminate him. In any event, if an alibi should tend to incriminate an

accused, it must be because of its inherent infirmity. The Constitution does not protect a defendant from the consequences of the defense he makes, nor assure him a right so to defend as to deny the State a chance to check the truth of his position. The cases uniformly reject the constitutional challenge here made. Rider v. Crouse, 357 F.2d 317, 318 (10 Cir. 1966); Jones v. Superior Court of Nevada County, 22 Cal. Rptr. 879, 882, 372 P.2d 919, 922 (Sup. Ct. 1962); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210, 219 (Sup. Ct. 1963), cert. denied, 375 U.S. 853, 11 L. ed. 2d 80 (1963); People v. Shulenberg, 279 App. Div. 1115, 112 N.Y.S.2d 374 (3d Dept. 1952); People v. Rakiec, 260 App. Div. 452, 23 N.Y.S.2d 607, 612-613 (3d Dept. 1940); People v. Schade, 161 N.Y. Misc. 212, 292 N.Y.S. 612 (Cty. Ct. 1936); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656, 657 (Sup. Ct. 1931); Commonwealth v. Vecchiolli, 208 Pa. Super. 483, 224 A.2d 96, 99 (Super. Ct. 1966); State v. Kopacka, 261 Wis. 70, 51 N.W.2d 495 (Sup. Ct. 1952), annotated, 30 A.L.R.2d 480 (1953); 1 Wharton, Criminal Evidence (12th ed. 1955) § 23, p. 75; 2 Underhill, Criminal Evidence (5th ed. 1956) § 440, p. 1110; see State v. Dodd, 101 Ariz. 234, 418 P.2d 571, 574 (Sup. Ct. 1966).

Defendant did not take the stand. He contends that during the trial the prosecutor alluded to defendant's right to testify and then in summation referred to his failure to do so. As to the first, the defense had suggested to the jurors in the voir dire that a certain relationship had existed between the defendant and the child's mother. The prosecutor simply said that whatever the defendant might say in that regard would be irrelevant.

The reference to the defendant's right to testify was incidental to the prosecutor's reaction to a position taken by the defense. As to the summation, the prosecutor apparently intended only to note that a factual assertion made by the defense during the trial had not been backed up by testimony. No objection was made to that remark. In fact defendant himself called attention to his right to testify, his counsel saying in the opening that "It will be his word against hers." At any rate, the trial court charged the jury that no inference should be drawn against defendant because of his failure to testify. We do not doubt the clear capacity of the instruction to dissipate any suggestion to the contrary by the prosecutor. See State v. De Stasio, 49 N.J. 247, 252 (1967), cert. denied, ___ U.S. ___, 19 L. ed. 2d 89 (1967). Nor does it matter that defendant objected to a curative charge. A defendant may not assert that there has been a forbidden comment and simultaneously object to a corrective instruction. To hold otherwise would be to say that an improper comment in this area must lead to a mistrial or a reversal, a proposition which we think would be unrealistic and unwarranted.

We have examined the remaining points and see no need to discuss them.

The judgments are affirmed.

Appendix C
Order of the Supreme Court of New Jersey Staying Mandate

(Filed 5/28/68)

SUPREME COURT OF NEW JERSEY
M-320 September Term 1967

(Same Title)

This matter having been duly presented to the Court, it is Ordered that the motion for a stay is granted upon condition that the petition for certification be filed with the United States Supreme Court within 30 days from this date.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 28th day of May, 1968.

A TRUE COPY
s/ John H. Gildea
CLERK

FILED
May 28, 1968
John H. Gildea
CLERK

Appendix D
Demand for Bill of Particulars as to Alibi

(Filed 6/14/66)

SOMERSET COUNTY COURT
LAW DIVISION

On Indictment, etc. No. 100-65-M

STATE OF NEW JERSEY

v.

NICHOLAS ANGELERI

Defendant.

TO Daniel E. Isles, Esq.
Attorney for Defendant, Nicholas Angeleri
501 Central Avenue
Orange, New Jersey

SIR:

Please take notice that if you intend to rely in any way, at the trial of the above entitled cause, on an alibi, that the County Prosecutor in and for the County of Somerset demands that you furnish, within ten (10) days from the service of this demand upon you, a written bill of particulars, signed by you and stating the specific place or places at which you claim to have been at the time of the offense with which you are charged and the names and addresses of the witnesses upon whom you intend to rely to establish such

Demand for Bill of Particulars as to Alibi

alibi.

Dated: June 6, 1966

s/ Michael R. Imbriani
Michael R. Imbriani
Deputy Attorney General In Charge

Notice of Motion

(Filed 6/27/66)

SOMERSET COUNTY COURT
LAW DIVISION

1965 Term, May Stated Session
Indictment No. 100-65-M

(Same Title)

TO: MICHAEL R. IMBRIANI, ESQ.
Deputy Attorney General In Charge
Office of the County Prosecutor
In and for the County of Somerset
Court House
Somerville, New Jersey

SIR:

PLEASE TAKE NOTICE that the undersigned attorneys for the defendant Nicholas Angeleri shall make application to the Somerset County Court, Law Division at the Somerset County Court House, Somerville, New Jersey, on Friday, July 15, 1966 at 9:30 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order of the court:

(1) Vacating and setting aside the Demand for Bill of Particulars as to Alibi served upon the Defendant.

(2) Permitting the defendant to testify as to alibi, if the defendant so chooses to, without compliance with the aforesaid Demand for Bill of Particulars as to Alibi.

Notice of Motion

(3) Such other relief as the court may deem just. Upon the grounds that the Demand for Bill of Particulars as to Alibi served upon the defendant violates the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution, compels the attorney for the defendant to disclose his work-product to the State of New Jersey, violates the Canons of Professional Ethics (Canon 37) and that Revised Rule 3:5-9 pursuant to which the Demand for Bill of Particulars as to Alibi, is an unconstitutional invasion of and deprivation of the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution; and

TAKE FURTHER NOTICE that upon the hearing of the said motion the undersigned attorneys for the defendant shall rely upon the brief to be submitted forthwith.

QUERQUES & ISLES
Attorneys for Defendant
NICHOLAS ANGELERI

By s/ Daniel E. Isles
DANIEL E. ISLES

Order Denying Motion to Vacate Bill of Particulars

(Filed 7/21/66)

SOMERSET COUNTY COURT
LAW DIVISION

(Same Title)

The defendant having moved to vacate the State's Demand for Bill of Particulars as to Alibi, and the Court having considered such motion on July 15, 1966, Michael A. Querques appearing for the defendant, and Raymond R. Trombadore, acting as First Assistant Deputy Attorney General, appearing for the State of New Jersey, and the Court having considered the briefs and arguments of the parties, and for the reasons set forth in this Court's separate findings and opinion,

It is on this 20th day of July, 1966, ORDERED that defendant's motion be and the same is hereby denied.

s/ J. Berkeley Leahy
Judge
Somerset County Court

Answer to Demand for Bill of Particulars

(Filed 1/16/67)

SOMERSET COUNTY COURT
LAW DIVISION

(Same Ttile)

TO: MICHAEL R. IMBRIANI, ESQ.
Deputy Attorney General In Charge
Somerset County Prosecutor's Office
Somerset County Courthouse
Somerville, New Jersey

PLEASE TAKE NOTICE that the defendant in the above captioned matter intends at the time of trial to rely on the defense of alibi.

The defendant will establish that on the following days he was at or in the places hereinafter set forth in New Jersey:

March 3, 1966 -

High Oaks Poodles, 161 Interhaven Avenue, North Plainfield, New Jersey

March 24 and March 31, 1966 -
125 Stelle Avenue, Plainfield, New Jersey
April 7, 1966 -

Office trailer on Skyline Drive, Warren Township, New Jersey.

The defendant will rely on the following witness and such others as may be revealed by further investigation.

Answer to Demand for Bill of Particulars

1. Mrs. Nicholas Angeleri, 343 Terrill Road, Scotch Plains, New Jersey

2. - 3. Tess and Al Newman, 161 Interhaven Avenue, North Plainfield, New Jersey

4. Dr. and Mrs. Maurice S. Meyers, 125 Stelle Avenue, Plainfield, New Jersey

5. Mal Rose, 308 So. First Avenue, Highland Park, New Jersey

s/ Michael A. Querques
MICHAEL A. QUERQUES
Attorney for Defendant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 237

NICHOLAS ANGELERI,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION

POINT I

Reference to Official Reports of Opinions Delivered in the Court Below

The opinion of the Supreme Court of New Jersey, the Court immediately below, which examined the judgment

of the County Court of Somerset County, Somerville, New Jersey, is officially reported at 51 N. J. 382, 241 A. 2d 3 (1968). The opinion of the County Court of Somerset, New Jersey, is unreported.

POINT II

Counter-Statement Concerning Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C., sec. 1257.

We respectfully submit that the decisions of the Supreme Court of New Jersey in this case involving the question presented in the petition are in conformity with the provisions of the *Fifth* and *Fourteenth Amendments* of the *Federal Constitution* and that the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of *certiorari* to review the decision of the Court below.

POINT III

Counter-Statement of the Case

The respondent, the State of New Jersey, is basically in accord with the statement of the case as stated by the petitioner.

However, the respondent wishes to emphasize that the answer of the defendant to the State's request for Bill of Particulars regarding alibi pursuant to Rule 3:5-9 listed nothing other than the names and addresses of the witnesses who would be called on the defendant's behalf. The defendant did not list the places where he claimed to have been on the dates in question, notwithstanding the fact that the State requested such information (Petitioner's Appendix D16a).

In fact, the defendant did not call Tess and Al Newman, persons listed in defendant's answer, to testify regarding an alibi, and the State made no comment at the time of trial concerning the defendant's failure to call the aforesaid witnesses.

The defendant, in answering the State's Bill of Particulars, disclosed no facts with regard to the nature of his alibi. At the trial Mr. Rose, defendant's accountant, testified that the defendant was with him at the defendant's construction trailer on one of the days in question and that they were completing the defendant's Federal Income Tax Returns, in anticipation of the April 15th filing deadline and that the defendant remained with him for the entire day (D70a-1 to 9). Dr. Meyers, another of defendant's alibi witnesses, testified that the defendant was seen by him in his office on the date in question. None of this information was elicited from the defendant prior to trial in response to the State's Bill of Particulars.

The State did interview defendant's alibi witnesses prior to trial for the purpose of ascertaining whether, in fact, the defendant had a valid alibi.

On April 1, 1968, the New Jersey Supreme Court rendered its decision affirming the judgment of the County Court of Somerset County, Somerville, New Jersey, and upholding the constitutionality of the Rule 3:5-9 of the rules governing the New Jersey Courts (1968).

POINT IV

Summary of the Argument

The State respectfully submits that the Rule requiring a defendant, who wishes to rely on the defense of alibi, to supply to the prosecution on demand a Bill of Par-

ticulars, giving the places where the defendant claims to have been at the time of the offense and the names and addresses of the witnesses who will be called upon to establish such alibi, does not violate the petitioner's rights under the *Fifth* and *Fourteenth Amendments* to the *United States Constitution.*

POINT V

Reasons for Denying the Writ

Rule 3:5-9 of the Rules Governing the New Jersey Courts provides for a reciprocal exchange of information between the defendant and the State concerning a proposed alibi defense. It does not in any way authorize any form of testimony from the defendant, nor does it require the defendant to explain the factual nature of his alibi. In fact, the State is without process to compel the witnesses listed in defendant's answer to the Bill of Particulars to submit to an interview or disclose any information prior to trial. The investigation made by the State is entirely a voluntary one.

Rule 3:5-9 further imposes a mandatory requirement of a reciprocal exchange of information on the State; in that, upon demand from the defendant, the State is required to furnish the defendant with the names and addresses of witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense.

It is apparent from the reading of Rule 3:5-9 that a reply to the State's demand for a Bill of Particulars with respect to alibi may not be used by the State in any way prior to the establishment by testimony of the defendant's witnesses listed therein of an alibi. If the defendant does not produce the witnesses listed therein,

the names furnished in reply to the State's Bill of Particulars cannot be used against him, and no inference may be drawn therefrom.

Consequently, the State contends that the information required of the defendant is not testimony, nor is it a compulsion causing the defendant "to be a witness against himself" within the meaning of the Fifth Amendment of the United States Constitution. The information required of the defendant is neither incriminating nor is it exculpatory. The Rule, for example, does not require the defendant to explain the nature of his alibi, *i.e.* what he was doing, what time he was there, or any other factual matters within the defendant's knowledge.

The State of New Jersey does not regard the defendant's alibi as an affirmative defense as distinguished from a general denial. *State* v. *Garvin,* 44 N. J. 268, 272 (1965); rather an alibi is simply a general denial of guilt. *State* v. *Petros,* 45 N. J. 540 (1965). The New Jersey Supreme Court has noted that the legislative purpose of the Rule was "to do away with existing unfairness in criminal trials of a surprise alibi and at the same time to give the defendant equivalent information as to the State's case." *State* v. *Baldwin,* 47 N. J. 379, 388 (1966).

It is significant that Rule 3:5-9 does not require or compel the defendant to take any affirmative act on his own defense. Rather, it states that if the defendant, on his own initiative, intends to take the affirmative act on his own defense of establishing an alibi, it must first be disclosed prior to trial; the obvious reason being to allow the State to conduct a reasonable investigation in order to determine whether, in fact, the defendant can establish an alibi.

It is quite conceivable that compliance with this Rule can result in a dismissal of charges against the defendant before trial if defendant's alibi is substantiated by the State's investigation following disclosure by the defendant.

If in the present case Rule 3:5-9 did not exist and the defendant produced alibi witnesses at the time of trial who, ostensibly, established the defendant's presence elsewhere at the commission of the offense, one of two situations would result.

The State would be compelled to proceed with the trial without first having the opportunity to investigate the factual circumstances of the alibi or the motive of the alibi witness. Such a compulsion is an open invitation for the commission of fraud and perjury. In the case at bar, it should be pointed out that Mr. Rose, one of defendant's alibi witnesses, was defendant's accountant, who had, since 1954, been involved in dealings with the defendant and who was paid annually by the defendant (D87a to D88a).

Dr. Meyers, who also testified as an alibi witness (D110a to D112a) resided at 125 Stelle Avenue, Plainfield, New Jersey, Appendix D, 16A. With this information the State was able to offer evidence to prove that the doctor's office was no more than fifteen minutes away from the scene of the crime; a point which was factually significant at the trial in that it tended to discredit the doctor's testimony of an alibi for the defendant at the *exact* time that the offense occurred.

Without this information the State in the two instances cited would not have been able to factually demonstrate that the defendant's alibi was unsubstantiated. Had the State only been apprised of the defendant's intention to call the alibi witnesses at the time of trial, the basic infirmity of the testimony could not have been es-

tablished, and the defendant might very well have convinced a jury of the truth of his alibi.

On the other hand if the State were to be afforded a reasonable opportunity to investigate the merits of the alibi witnesses' testimony following disclosure at the trial a lengthy adjournment of the trial would be necessitated. Such a ruling would utterly destroy the efficiency of the criminal court system, would result in criminal juries being sequestered over lengthy periods of time, and might, in fact, redound to the defendant's prejudice, since trial publicity could hardly be kept from the jurors during the course of the adjournment. In this event the jurors could become influenced by court rulings made outside of their presence and by publicity of matters excluded from evidence.

Chief Justice Weintraub in the New Jersey Supreme Court's decision cited in defendant's brief, Appendix A at page 7a, puts the basic problem quite clearly.

> "The Constitution does not protect a defendant from the consequences of the defense he makes nor assure him a right to defend as to deny the State a chance to check the truth of his position."

All of the cases cited in that opinion are in accord, and in fact, the defendant has not cited any cases to the contrary.

CONCLUSION

For the reasons here and before set forth, we respectfully submit that the petition for the writ of *certiorari* should be denied.

Respectfully submitted,

MICHAEL R. IMBRIANI,
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Attorney for the Plaintiff-Respondent The State of New Jersey.

S. PHILIP KLEIN,
Assistant Prosecutor,
Of Counsel.